

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001- 6092

RE: Allen Road Land Company, Inc.
Land Use Permit #4C1060-EB
Docket # 781

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This appeal concerns Land Use Permit #4C1060 ("Permit") authorizing the subdivision of 28.21 acres on Allen Road, in South Burlington, Vermont, known as parcel C, to create 32 single-family residential lots and one lot (Lot 36) with six residential duplex structures (for a combined total of 44 residential units) to be served with municipal water and sewage facilities. In addition, three other lots are proposed (one retained by the Allen Road Land Company, Inc., Lot 35; one proposed as open space, Lot 33; and one for a city park, Lot 34) for a combined total of 36 lots ("Project").

As explained below, the Vermont Environmental Board ("Board") concludes that Permit condition 48, which prohibits in perpetuity the subdivision or development of Lot 35, is required in order for the Project to comply with 10 V.S.A. § 6086(a)(8) ("Criterion 8"), scenic or natural beauty of the area and aesthetics.

I. PROCEDURAL SUMMARY

On December 5, 2000, the District #6 Environmental Commission ("Commission") issued the Permit and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to John Larkin d/b/a Allen Road Land Company, Inc. ("Permittee").¹

On February 21, 2001, the Permittee filed an appeal with the Board from the Permit and Decision alleging that the Commission erred in its conclusions concerning Permit condition 48 which prohibits the development or subdivision of Lot 35. The appeal was filed pursuant to 10 V.S.A. §6089(a) and Environmental Board Rule ("EBR") 6 and 40.

On February 27, 2001, Julie Taylor, on behalf of herself, Harbor Heights Condominium Association and David Heleba, filed a letter and notice of

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Due to a potential conflict of interest, the District #6 Environmental Commission presided over this matter even though the Project is located in District #4.

appearance challenging the validity of Permittee's appeal with respect to compliance with Board rules.

On March 26, 2001, Board Chair Marcy Harding convened a prehearing conference with the following participants:

The Permittee by Carl H. Lisman, Esq.
Harbor Heights Condominium Association, David Heleba and Julie Taylor
("Harbor Heights") by Julie Taylor.²

On March 26, 2001, during the prehearing conference, David Heleba, individually, and Mark Waters, individually and as President of the Harbor Heights Condominium Association, filed letters expressing their interest in retaining their party status in this appeal. Both David Heleba and Mark Waters designated Julie Taylor as their representative and the representative of the Harbor Heights Condominium Association.

On March 30, 2001, Chair Harding issued a Prehearing Conference Report and Order ("PHCRO") .

Throughout May 2001, the Parties filed their exhibits, prefiled direct and rebuttal testimony, exhibit and witness lists, and Proposed Findings of Fact and Conclusions of Law.

On June 14, 2001, Chair Harding convened the second prehearing conference via conference call with the following participants:

The Permittee by Carl H. Lisman, Esq.
Harbor Heights by Julie Taylor.
Joseph E. Frank.

On June 20, 2001, the Board conducted a hearing on this matter. As part of the hearing, the Board conducted a site visit to the Project.

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On March 19, 2001, Joseph E. Frank filed a letter with the Board notifying the Board of his unavailability to attend the March 26, 2001 prehearing conference and his interest to participate in the hearing.

After recessing the hearing, the Board deliberated on June 20, 2001 and July 18, 2001.

Based on a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUES

1. Whether Permit condition 48, which prohibits the subdivision or development of Lot 35, is required in order for the Project to comply with 10 V.S.A. § 6086(a)(8), scenic or natural beauty of the area and aesthetics.

2. If the answer to issue 1 is in the negative, whether the Board should impose a different condition or conditions in the Permit in order for the Project to comply with 10 V.S.A. § 6086(a)(8), scenic or natural beauty of the area and aesthetics.

III. FINDINGS OF FACT

To the extent any proposed Findings of Fact and Conclusions of Law are included below, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-42 (1997).

The Findings of Fact below are organized into a general section followed by a section related to the specific issues.

A. General Findings

1. The Commission issued Land Use Permit #4C1060 on December 5, 2000 authorizing the Project.
2. The Project is generally located between U.S. Route 7, also known as Shelburne Road, in South Burlington, on the west, and Spear Street, on the east, Allen Road to the south and Harbor View Road to the north, in the southern part of South Burlington.
3. Access to the single family lots and the multifamily buildings will be through an extension of Bay Crest Drive, which will intersect with Allen

Road and Harbor View Road; Irish Farm Road, which will intersect with Harbor Ridge Road; and Haymaker Lane. Homes already exist on Harbor Ridge Road as a part of a prior unrelated subdivision.

4. Roughly 2,500 linear feet of new roads will be created by the Project.
5. Lot 35 occupies the western 4.55 acres of the site and lies immediately west of Lot 36. It is bounded on the north by a small parcel of land owned by the City of South Burlington, on the south by lands ("Parcel A") currently owned by Frank Irish (who sold the Project site to the Permittee), and on the west by the Pillsbury Manor nursing home and the Harbor Valley assisted living apartments.
6. Parcel A is 5.5 acres in size, and the Permittee has a right of first refusal to purchase that property.
7. Permittee's Land Use Permit application depicts Lot 35 as being "reserved for future use."
8. The Project was approved by the City of South Burlington as a planned residential development, and has a setback distance of 50 feet from all boundaries.
9. Lot 35 includes some Class III wetland area. The Project incorporates a 50-foot buffer zone in which no development can occur surrounding the Class III wetland.
10. Lot 35 currently has a number of pine and birch trees growing in the area within the wetland buffer zone.
11. The area of restricted land covered by the Class III wetlands and buffer zone leaves roughly 0.75 acres of Lot 35 that could be developed in the future. This developable portion of Lot 35 is located in the southwest third of the lot. The existing tree line screens much of this developable portion of Lot 35 from view.
12. The Harbor Heights Condominium Development is located on the north side of Harbor View Road, across from Lots 35 and 36.

13. A small parcel of land, owned by the City of South Burlington, is adjacent to and north of Lots 35 and 36. The City lot separates Lot 35 and part of Lot 36 from Harbor View Road.
14. The city-owned parcel is undeveloped and does not impede the view of Lot 35 from the Harbor Heights Condominiums.
15. Condition 48 of the Permit reads:

Lot 35 shall remained undeveloped in perpetuity. No trees, shrubs or other vegetation shall be removed, and no alterations, including excavation, grading or soil stockpiling, may occur on Lot 35 with the exception of the stormwater discharge outfall construction shown on the approved plans and any related stormwater maintenance activities.
16. Construction on the Project site is currently underway.
17. The entire 28.21 acre parcel contains primary agricultural soils. Roughly 25.5 acres of the primary agricultural soils will be impacted by the Project.

B. Criterion 8 (Aesthetics)

18. The areas to the north, east and west surrounding the Project are not open; they are filled with residential, institutional, industrial and commercial development. The institutional developments of the Pillsbury Manor nursing home and the Harbor Valley assisted living apartments and the industrial operations of Shelburne Plastics are on Harbor View Road. Single family subdivisions on Bay Crest Drive, Spear Street, and Allen Road face the Project. There are about 100 housing units in the surrounding condominium developments of Harbor Heights, Harbor Meadows, and Bay Court.
19. The area immediately south of the Project, across Allen Road is a large open meadow immediately followed by a heavily treed mature growth area. The contrast of the development, including the Project, to the north of Allen Road and the open parcel to the south of Allen Road is notable.

20. The open space to the south of Allen Road is particularly scenic, and has characteristics that are rare in Chittenden County.
21. The undeveloped Project site was open space including undeveloped hayfields. Lands adjacent to the Project site include an old barn, and a small farm and farm stand. In the past, there were cows on the farm east of the Project site.
22. The undeveloped project site was visible to numerous people walking, biking, and driving along Harbor View Road, Bay Crest Drive, and Allen Road. The number of people who pass the Project site daily is not limited to the residents of the nearby housing units as there are many drivers and bike riders who pass the site when traveling between Shelburne Road and Spear Street on either Harbor View Road or Allen Road.
23. The Project site's open space was particularly important to the area because of the contrasting density and nature of development in the area, and because of the large number of people who view the site daily.
24. The trees and wetlands contained on Lot 35 make it particularly attractive from the standpoint of scenic and natural beauty.
25. The Permittee's Project plans call for buildings to be of similar architectural style and colors as the existing surrounding development. Lot sizes and shapes are similar to the adjacent existing subdivisions and developments. The street network proposed for the Project is designed to integrate with the existing roads as natural extensions. Street lighting will have low wattage and consist of cut-off luminaries.
26. The developable portion of Lot 35 is screened from view from the Harbor View Condominiums by a natural tree line. The Project site will be briefly visible from the intersection of Allen Road and Spear Street.
27. Lots 33 and 34 of the Project are set aside as open space. Lot 34 is reserved for use as a municipal park, and Lot 33 is designated for use by the Allen Road Landowners association. Together, these two lots total approximately 5.2 acres.

IV. CONCLUSIONS OF LAW

A. De Novo Review and Burden of Proof

When there is an appeal from a District Commission determination, the Board provides a “de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the Rules of the [B]oard.” 10 V.S.A. § 6089(a)(3). The Board’s rules provide for a review of the District Commission’s findings of fact, conclusions of law and permit condition. EBR 40(A). Thus, the Board can not rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission in this matter. Rather, it must regard the decisions and exhibits offered below as evidence to be offered by the parties to the Board.

The term “burden of proof” refers to two separate burdens: the burden of going forward and producing evidence, and the burden of persuasion. See 10 V.S.A. § 6088; *In re: Denio*, 158 Vt. 230, 236 (1992); *Re: Pratt’s Propane*, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 27, 1987). 10 V.S.A. § 6088 operates in conjunction with the requirement that before a permit can be issued, the Board must make the affirmative findings required under the 10 criteria. See 10 V.S.A. § 6086(a). Because the Board is limited to de novo review of the District’s Commission’s decision, it must evaluate the parties’ evidence based on certain rules governing the allocation of the burdens of production and persuasion.

The Permittee has the burden of production with respect to the criterion on appeal. *Pratt’s Propane*, *supra* at 5. The neighboring landowners bear the burden of persuasion with respect to Criterion 8. 10 V.S.A. § 6088(b).

B. Criterion 8 - Aesthetics

Before issuing a permit, the Board must find that a proposed project will not have an undue adverse effect on the aesthetics of the area. The Board relies upon a two part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse effect under Criterion 8. The Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will “fit” the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project’s surroundings, the compatibility of the project’s design with those surroundings, the locations from which the project can be viewed, and the potential impact of the project on open space.

Second, if the Board concludes that the Project will have an adverse effect under Criterion 8, then the Board must evaluate whether the adverse effect is "undue." The Board will conclude that the adverse effect is undue if it reaches a positive finding with respect to any one of the following factors:

1. Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Have the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?
3. Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Criterion 8, "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from her property will remain the same forever." *Re: Okemo Mountain, Inc., #2S0351-S-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 18, 1986). Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Horizon Development Corp., #4C0841-EB*, Findings of Fact, Conclusions of Law, and Order (Aug. 21, 1992). Nevertheless, projects that result in the loss of open space and the alteration of vistas can have an adverse effect on aesthetics and scenic beauty. See *Re: Quechee Lakes Corp., #3W0411-EB*, Findings of Fact, Conclusions of Law and Order (Nov. 4, 1985).

1. Adverse Effect

The Project takes up a total of 28.21 acres of land. All 28.21 acres contain primary agricultural soils, and 25.5 acres of the primary agricultural soils are impacted by the Project. Before the Permittee began developing the site, the lands were open space that provided numerous passersby with a scenic view. Prior to the development of the site, the neighboring Harbor Heights Condominium development had an uninterrupted southern view across the Project site to additional agricultural lands on the south side of Allen Road. That view will be interrupted by the Project. In the site visit of June 20, 2001, the

Board noted the contrast of the Project site with surrounding development to its north and the still open parcel south of the Project. The parcel to the south of Allen Road offers a scenic view of open lands. The Board notes that, especially in Chittenden County, open space with high quality agricultural soils is becoming more and more scarce due to increasing development.

The Permittee argued that the Project is an example of “in-filling.” The Permittee’s witness, Lance Llewellyn, testified that “in-filling” is a term generally applied in the development field. The term is used to illustrate how the development of an undeveloped parcel in the middle of a developed area will merely be a “filling in” of that space. The Board concludes that this Project is not an example of “in-filling” due to the fact that the Project is not surrounded on all sides by development. As noted above, the undeveloped area to the immediate south of the Project site is open space.

When the Board evaluates whether a proposed project “fits” in the context of the surrounding area, particular attention must be paid to the impact a project presents to the open space of an area. See *Re: Quechee Lakes Corp.* The Board has noted that “[l]oss of open space tends to be ‘adverse’ from a strictly aesthetic standpoint, because open space is an important feature in the scenic beauty of Vermont.” *Re: Quechee Lakes* at 19; see also *Nile and Julie Duppstadt & John and Deborah Alden, #4C1013(Corrected)-EB*, Findings of Fact, Conclusions of Law, and Order at 33 (Apr. 30, 1999)(adverse aesthetic effect caused by the placement of 55 separate lot homes in an rural area of pastoral open spaces and farm land). Even though this project is not entirely out of character with the surrounding area, the Board finds that this Project has a significant impact on the loss of open space in the area. Accordingly, the Board concludes that the Project will create an adverse aesthetic impact.

2. Undue

As the Board has determined that the Project will have an adverse effect under Criterion 8, the Board must next evaluate whether the adverse effect is “undue.” The Board will find that the adverse effect is undue if it reaches a positive finding with respect to any of the following factors:

a. Written Community Aesthetic Standard

The Board was offered no evidence to show that there is a clear, written community standard intended to preserve the aesthetic or scenic beauty of the

area. Therefore, the Board must conclude that no such standard is violated by the Project.

b. Generally Available Mitigating Steps

The Permittee has taken several mitigating steps to offset the impacts of the Project. The Permittee has dedicated Lot 33 and 34 to the preservation of open space. Together these two lots total 5.5 acres. Lot 33 is to be maintained as open space and managed by an association of the development landowners. Lot 34 has been dedicated to the City of South Burlington for use as a city park. Additionally, Lot 34 is to be immediately adjacent to the northern edge of Allen Road, thereby reducing the number of homes that will be fronted on the busy roadway. Also, the Project's buildings will be similar in architectural style and color to the surrounding development. The Project will also use low wattage street lighting with cut-off luminaries.

The Board is not convinced that these steps alone are enough to mitigate the adverse aesthetic impact created by the Project. Given the value of the open space to the neighbors and those who pass by the parcel, this Project must retain as much open space as is possible in order to mitigate this adverse aesthetic impact.

Lot 35 has been marked as "reserved for future use" by the Permittee. The Permittee maintains that there are no current plans to develop Lot 35, and it will remain as open space for the foreseeable future. The Board noted on the site visit that the tree line which is rooted in Lot 35 is one of the dominant aesthetic features of the Project site and should be maintained. Lot 35 also contains a Class III wetland area for which a 50-foot buffer zone is required. The restrictions on the development of Lot 35 severely limit the area that the Permittee could hope to develop. Harbor Heights and Joseph Frank point out that the Permittee has a right of first refusal to purchase the adjacent Parcel A, and if they chose to do so, the development of Lot 35 seems more likely. Ensuring the preservation of Lot 35, in perpetuity, is one additional mitigating step that is necessary to offset the adverse impacts of the Project. Only with Lot 35's open space preserved can the Board find that the Permittee has taken all generally available mitigating steps to prevent the adverse aesthetic impact from becoming undue.

c. Offensive or Shocking

In determining if a project is offensive and shocking, the Board views the Project through the eyes of the average person. The Board concludes that the Project is not offensive or shocking to the average person, in that it is not entirely out of character with the surrounding area. The Board also recognizes that the sort of development that the Project presents has become a familiar sight to many in Chittenden County. Though the Board has characterized the loss of the open space as an adverse aesthetic impact caused by the Project, the loss of the open space and the construction of the Project, especially given the surrounding development, is not enough to offend or shock the average person.

3. Conclusion

The Board concludes that the Project will have an undue adverse effect on the aesthetics or scenic or natural beauty of the area. To offset this effect, the Board finds that Permit condition 48, which prohibits the subdivision or development of Lot 35³, is required in order for the Project to comply with 10 V.S.A. § 6086(a)(8), scenic or natural beauty of the area and aesthetics. The Board also concludes that Lot 35 should be maintained as open space in perpetuity.⁴

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During the June 20, 2001 site visit to the Project, the Board noticed the piling of “fill” on Lot 35. This activity may constitute a violation of Permit Condition 48. Condition 48 reads, in part, “no alterations, *including excavation, grading, or soil stockpiling*, may occur on Lot 35 with the exception of the stormwater discharge outfall construction shown on the approved plans and any related stormwater maintenance activities” (emphasis added).

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In his closing argument, Permittee’s counsel suggested that the two words “in perpetuity” had never been used by the Board to condition a Land Use Permit. The Board, however, used those exact words to condition a previous Land Use Permit that was issued to MBL Associates, a development group that includes John Larkin who is also a member of the Allen Road Land Company. See *MBL Associates, LLC, #4C0948-3-EB*, Findings of Fact, Conclusions of Law and Order at 4 (Oct. 20, 1999).

In light of this decision, the Board does not address the second issue of whether the Board should impose a different condition or conditions in the Permit in order for the Project to comply with 10 V.S.A. § 6086(a)(8), scenic or natural beauty of the area and aesthetics.

V. ORDER

1. Condition 48 as stated in the Land Use Permit #4C1060 is required in order for the Project to comply with 10 V.S.A. § 6086(a)(8), scenic or natural beauty of the area and aesthetics.
2. As the Board answers Issue 1 in the affirmative, the Board does not reach Issue 2.
3. Land Use Permit #4C1060-EB is issued.
4. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 18th day of July, 2001.

ENVIRONMENTAL BOARD

/s/Marcy Harding_____
Marcy Harding, Chair
George Holland
Samuel Lloyd
Alice Olenick
Nancy Waples
A. Gregory Rainville, Alternate Member
Donald Sargent, Alternate Member